

In the reply of 06/08/2009 filed in response to the Notice of Non-Compliant Amendment mailed on 04/06/2009, Applicant argues that, "since original claims 1-12 were examined without requiring Applicants to elect a species in the Office Action on the merits mailed on July 8, 2008, the Examiner's constructive election of claims 1-12 is improper". Examiner would like to emphasize that the original claims were drawn to a single species (currently removed by the Applicant in the latest amendment). Accordingly, at the time of the first action on the merits, there were no grounds for restriction. Examiner maintains that, since Applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits.

Applicant further argues that the "constructive election of original claims 1-12 is improper" because the "original claim 1 and amended claim 1 are both directed to an analyzing tool"; because the originally filed claim 1 is broad enough in scope to cover the features added in the latest amendment.; because the added features are supported by the original specification; and because the amendment in question "did not remove any features of original claim 1, but merely further defined the invention of claim 1 by including. additional structural features of the analyzing tool of original claim 1". Examiner agrees that claim 1, as originally filed, was broad. Original claims 1-12 were not directed to Species II at the time of the first action on the merits. The features of Species II were added later, after the first action on the merits, while the features of Species I, were removed from all the dependent claims. The resulting claims are now drawn to Species II which is patentably distinct from Species I, as was shown in the

04/06/2009 Office Action. Thus, Applicant attempted to remove the originally presented Species I and replace it with Species II, not presented in the claims by the time of the first action on the merits.

Examiner maintains that claims 1-3 and 5-12, as amended, are directed to an invention distinct from that originally claimed (see the appropriate paragraphs of the 04/06/2009 Office Action). Applicant has shifted the invention originally claimed, and that is not permitted. Applicant must present claims which are directed to the invention claimed at the time of the first action on the merits.

Claims 1-3 and 5-12, as currently amended, have been withdrawn from consideration as being directed to the non-elected invention (see the 04/06/2009 Office Action). Thus, there are no pending claims directed to the invention elected by original presentation. Since the latest reply appears to be *bona fide*, Applicant is ADDITIONALLY given **ONE (1) MONTH or THIRTY (30) DAYS** from the mailing date of this notice, whichever is longer, within which to supply the omission or correction in order to avoid abandonment. **EXTENSIONS OF THIS TIME PERIOD MAY BE GRANTED UNDER 37 CFR 1.136(a).**

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Natalia Levkovich whose telephone number is 571-272-2462. The examiner can normally be reached on Mon-Fri, 2 p.m.-10 p.m.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jill Warden can be reached on 571-272-1267. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Natalia Levkovich/
Examiner, Art Unit 1797